

Capital Cleaning Contractors, Inc. and Local 32-B-32-J, Service Employees International Union, AFL-CIO. Case 29-CA-16518

December 27, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

On December 15, 1993, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Capital Cleaning Contractors, Inc., Queens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraphs 2(c), (e), (f), and (g).

“(c) Within 14 days from the date of this Order, offer to unit employees formerly employed by Ogden Allied Services full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

“(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and re-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's conclusion that the Respondent's actions indicated an intent to avoid hiring its predecessor's employees, we do not rely on the judge's finding that the Respondent, although advised by the Union on April 15, 1992 that the predecessor's employees desired to apply for jobs with the Respondent, made no attempt to arrange for an application process through the Union.

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

ports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

“(f) Within 14 days after service by the Region, post at its facility in Huntington Station, New York, and at the Bulova Corporate Center, Queens, New York, copies of the attached notice marked ‘Appendix.’¹³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 1992.

“(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Local 32B-32J, Service Employees International Union AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All service employees employed at the Bulova Corporate Center, located at 75-10 Astoria Boulevard, in the Borough of Queens, City and State of New York, excluding all guards and supervisors within the meaning of the Act.

WE WILL NOT change wages or any other terms and conditions of employment of the employees in the above unit without notifying and bargaining with the Union.

WE WILL NOT refuse to hire employees because of their membership in the Union or to avoid recognizing and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above bargaining unit.

WE WILL rescind any departures from terms and conditions of employment that existed immediately before our takeover from Ogden Allied Services of the cleaning operation at the Bulova Center, retroactively restore preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes until we negotiate in good faith with the Union to agreement or to impasse, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Oscar Gallardo	Marta Roman
Donald O. Darko	Nicolco Arsov
Leonor Alvarez	Henry Ivy
Krystyna Mazurek	Socrates D. Miranda
Rosa Porras	Susanna Olivera
Yanira Serrano	Walter Garcia
Ron Moore	Patricia Salley
Magdalena Mercado	Claudia Alzale
Maria Rosario	

WE WILL make whole the employees for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

CAPITAL CLEANING CONTRACTORS, INC.

Kathy Drew King, Esq. and *April M. Wexler, Esq.*, for the General Counsel.

Frederick D. Braid, Esq. and *Deborah A. Kerker, Esq.* (*Rains & Pogrebin, P.C.*), of Mineola, New York, for the Respondent.

Ira A. Sturm, Esq. (*Manning, Raab, Dealy & Sturm*), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn, New York, on March 2, 3, 4, and 29, 1993. The complaint alleges that Respondent, in violation of Section 8(a)(1), (3), and (5) of the Act, refused to hire the employees of its predecessor, refused to bargain with the Union as the representative of the unit employees, and unilaterally changed the wages and other terms of employment of the unit employees. Respondent denies that it has violated the Act.

On the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent in July 1993, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office in Huntington Station, New York, is engaged in providing cleaning services on a contract basis. Respondent annually receives supplies valued in excess of \$50,000 directly from outside the State of New York or from firms in the State of New York which receive the supplies directly from outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

This case arises from events flowing from a change in the identity of the contractor engaged to provide cleaning services for a premises known as the Bulova Corporate Center in the County of Queens in New York City. Since 1986, Ogden Allied Services has been the contractor that cleaned the Bulova Corporate Center. Ogden is a member of an employer association known as the Service Employers Association. Ogden was a signatory to a series of contracts with Local 32B-32J, the latest of which had a term from January 1, 1990, to December 31, 1992. In April 1992, after a bidding procedure was conducted with respect to the provision of cleaning services, it became known that the Bulova Corporate Center would terminate its relationship with Ogden and that it would award the cleaning contract to Respondent Capital Cleaning Contractors. On May 1, 1992, Ogden informed the unit employees that they were terminated and, on May 2, Capital took over the job of cleaning the premises.

Ogden had employed approximately 19 employees to clean the Bulova premises. The contract with the Union provided that most of the employees were paid between \$8.50 and \$9.50 per hour and that they received benefits including medical insurance and pension contributions. The bargaining unit of Ogden's employees represented by the Union was:

All service employees employed at the Bulova Corporate Center, located at 75-10 Astoria Boulevard, in the Borough of Queens, City and State of New York, excluding all guards and supervisors within the meaning of the Act.

2. Awarding the contract to Capital

Capital Cleaning was begun about 30 years ago as a small company providing cleaning services; Capital generally requires only one or two people per building to perform the work. Over the years, Capital has grown to provide services in six States. In New York State, Capital cleans approximately 500 buildings; most of the workers who clean these buildings are employed by subcontractors. Capital pays the subcontractors a percentage of the amount Capital receives for providing the cleaning services, and the subcontracting fee is adjusted according to certain arrangements for providing paper and cleaning products at the premises.

Dennis Kaplan, the vice president of Capital, testified that he was in charge of the effort to obtain the cleaning contract at the Bulova Center. During the bidding process, according to Dennis Kaplan, the Bulova building manager told him that he was not happy with the overall performance of Ogden and that it was expected that the new contractor would maintain the building in a better fashion. No specifics were added to this vague statement of dissatisfaction, and the record is not clear whether Bulova management believed that there was a problem with the Ogden employees or whether Bulova faulted the Ogden management.

Dennis Kaplan testified that he was very eager to obtain the work at Bulova. Not only was this by far the largest job that Capital had ever had, but it was important for Capital to be able to say that it cleaned the Bulova premises because of the prestige that Kaplan believed attached to the location. When Dennis Kaplan learned that Capital had been awarded the contract by Bulova management, he was concerned about staffing the job which he estimated to require from 15 to 18 employees. According to Kaplan, he had a subcontractor lined up: KCR, owned by Reggie Porto, was the subcontractor on a number of other cleaning contracts held by Capital Cleaning. However, Dennis Kaplan was not sure that KCR could supply enough labor to clean the Bulova premises and he considered dividing the work between two subcontractors. Kaplan also testified that he would have been willing to hire some of the Ogden employees who were currently cleaning the Bulova Center; if he had hired all the former Ogden employees, he would not have dealt with KCR at all. Kaplan's testimony about his willingness to hire Ogden employees will be discussed in detail below.

3. Ogden employees and Capital Cleaning

At the beginning of April 1992, when some of the Ogden's employees learned that they would no longer be supplied with uniforms by Ogden, they contacted Union Business Agent Anthony Spataro to communicate their fears

about their jobs. On about April 10, Spataro heard from a manager of Ogden that Capital Cleaning would be given the contract to clean the Bulova Center; Spataro also learned that a manager of Capital was Dennis Kaplan. Spataro found Capital's advertisement in the yellow pages, made a number of copies with the name of Dennis Kaplan in his handwriting at the top, and took the copies to the Bulova Center on April 14. Spataro gave each Ogden employee a copy of the advertisement with instructions that the employee was to call Capital and apply for a job cleaning the Bulova Center.¹ Spataro testified that on Wednesday, April 15, he drove to Capital's office in Huntington Station, Long Island, New York, and asked to see Dennis Kaplan. Instead, Spataro saw a man who identified himself as Al Kaplan. Al Kaplan is the cousin of Dennis Kaplan and he is the president of Capital Cleaning. Spataro told Al Kaplan that he had heard that Capital was the new cleaning contractor at the Bulova Center. Al Kaplan replied that he was not aware of the Bulova work. Spataro handed Al Kaplan a letter and told him that the Union was unconditionally requesting employment for the 19 employees whose names appeared on the letter. Al Kaplan said that he would ask Dennis Kaplan to get in touch with Spataro. The letter handed by Spataro to Al Kaplan is dated April 15, 1992, and it states:

Local 32B-32J represents the employees performing this work currently in the employ of Ogden Allied Corporation. We hereby make unconditional application for continued employment for each of the employees on the attached list.

We also request that you contact Ron Goldman of Manning, Raab, Dealy & Sturm . . . so that a mutually satisfactory time and place can be arranged to commence negotiations.

Between April 16 and 23, Spataro called the offices of Capital Cleaning four times, each time asking to speak to Dennis Kaplan and leaving his name and number with a request that Kaplan return his call. Dennis Kaplan did not call Spataro.

Testifying about the Union's request that he hire the Ogden employees, Dennis Kaplan stated that the request "seemed a little rough to us" because he was used to staffing with his own people. But Kaplan also said that he wanted to hire the Ogden employees because "these people could have made a very smooth transition for me in that building."

About April 20, 1992, Dennis Kaplan went to the Bulova Center and gave a number of copies of a notice to Bulova Center Building Manager Dan Mishael for distribution to the Ogden employees. Kaplan told Mishael that because the Union had sent a letter requesting employment for its members, Capital's attorney had told Kaplan to distribute the notice to the employees. The notice stated in pertinent part:

Effective May 2, 1992, we will be the new cleaning company at the Bulova Building.

Although a number of you have called our office, no one has submitted an application for work. The union . . . has . . . stated that it is making an "unconditional

¹ Although Spataro identified G.C. Exh. 2 as the advertisement he gave to employees, it is clear that his testimony is incorrect. The exhibit does not have Dennis Kaplan's name written on it.

application for continued employment" for everyone This is not sufficient to apply for work with us. You must call our office . . . and ask for the Personnel Department. Tell them you are working at the Bulova Building, and that you are interested in applying for a job with us. Make an appointment to fill out an employment application, and bring satisfactory proof that you may lawfully be employed in this country. We will advise you of our decision after we complete a reference check.

Starting wages are \$5.00 per hour. We do not provide health insurance, and there is no pension.

On April 27, 1992, Capital's labor counsel wrote to the Union enclosing a copy of the notice to employees and stating that Respondent would bargain with the Union if the work force at the Bulova Center "is composed of a majority of employees represented by [the Union] with the existing employer." Thus, Respondent Capital acknowledged the duty to bargain as a successor if it hired a majority of Ogden employees.

Dennis Kaplan testified that between the time Capital was awarded the cleaning contract in mid-April 1992, and the day the job began on May 2, he went to the Bulova Center three or four times. In addition, Charles Peitz, the Capital area manager in charge of the Bulova Center job, was on the premises twice during that period.² However, neither Kaplan nor Peitz at any time brought applications for employment with Capital to the Bulova Center. On April 27, Respondent Capital mailed to the employees on the list provided by the Union a copy of the notice. Because the notices were mailed by certified mail, many of the employees had to travel to the post office to obtain them and this led to a delay of several days.

Dennis Kaplan testified that he wanted to be directly involved in the hiring of the personnel who would perform the Bulova job and that he wanted to meet the employees who came in to apply for work. Although Kaplan admitted that he could have met with all the Ogden employees at the Bulova premises, he stated that he wanted to interview the people in his own office. The evidence shows that employees who called for information about a job with Capital at the Bulova site were told that they should come to the Huntington, Long Island, office of Respondent on Wednesday or Thursday between the hours of 2 and 4 p.m. The record establishes that in order to travel from the Bulova location to Respondent's Huntington Station office, one would have to drive for 35 minutes by car, or one would have to take a combination of at least two different buses, the subway, and the Long Island Railroad. A trip by public transportation would take far longer than 35 minutes. By contrast, Capital rents desk space in Rego Park, Queens, a location about 10 minutes by car from the Bulova Center. Dennis Kaplan testified that he and the other supervisors of Respondent occasionally use the Rego Park office. Kaplan did not explain why it was preferable for the applicants to be interviewed at the Huntington Station office instead of the Rego Park office.

² Kaplan testified that because of the importance of the Bulova job to Respondent, he still goes to the site at least two or three times a week and that at first he was there every day.

I note that the employees of Ogden worked the day shift from 8 a.m. to 5 p.m. or the night shift from 4:30 p.m. to midnight, Monday through Friday. Thus, in order for employees to pick up applications at the time designated by Respondent, the day-shift employees would have to leave work several hours early.

The record establishes that on several occasions Respondent has obtained a contract to perform cleaning at a premises and has interviewed prospective employees at those premises without requiring them to travel to the Huntington Station office. Al Kaplan testified that Capital cleans the premises of Garret Aviation in Suffolk County, Long Island, and that he traveled out to the Garrett facility to interview an employee named Vito Parisi; during the interview, Al Kaplan gave Parisi an application for employment with Capital. After Parisi ceased performing his duties, Al Kaplan traveled to the Garrett premises to interview another prospective employee, Steve Masciopinto; during that interview, Kaplan gave Masciopinto an application for employment with Capital. Finally, when Masciopinto left, Al Kaplan traveled out to Garrett once again to interview yet another employee, a person named David Loper; Kaplan gave Loper an application for employment with Capital when the two met at the Garrett facility. Further, Dennis Kaplan hired James Bayes, a porter at Astoria Federal Savings Bank in Lake Success, Long Island, after Capital was awarded the contract to clean the Bank. Bayes had been employed by the previous contractor. Dennis Kaplan traveled out to the Bank to see Bayes and carried an employment application with him on this occasion, and Bob Devorak, another supervisor of Capital, interviewed Bayes at the Bank as well.

Al Kaplan testified that because Respondent uses subcontracted labor, it does not usually advertise for cleaning personnel and that there is no well established application process for cleaning staff. However, Capital advertises for salesmen and supervisors out of New York State. Potential applicants for these jobs are told to mail their resumes to the Huntington Station office and, initially, they are interviewed by a manager in an outlying field office. Applicants for clerical jobs at the Huntington Station office are interviewed in that office. There are no clerical employees stationed in the Rego Park office.

Ogden employee Patricia Salley testified that about mid-April 1992, Union Business Agent Spataro gave the cleaning employees a flyer with information about Capital Cleaning, instructing them to call Capital and make an appointment to apply for a job at the Bulova Center. Salley immediately telephoned Capital, stated her name, and inquired for a job with Capital at the Bulova Building. The unidentified man to whom Salley was speaking asked her where she had gotten her information. Salley responded that it was from Spataro, and she asked if she needed an appointment and inquired about the procedure for filing for employment. The man said Capital was accepting applications between the hours of 2 and 4 p.m. on Wednesdays and Thursdays at the Long Island office. Salley asked whether she could come at another time, explaining that it was hard for her to take time off on those days.³ The man responded that those days were the only days Capital was conducting interviews. Salley made an appointment to apply for a job with Capital on the next day,

³ Salley's hours are 8 a.m. to 5 p.m., Monday through Friday.

a Thursday. On the day that she was to go to the Capital office in Huntington Station, Salley testified, Ogden employee Ronald Moore told her that Capital was not hiring union members and that it was no use filing an application. As a result, Salley did not go for an interview with Capital. Salley testified that on the Friday after she had telephoned Capital, Spataro came to the Bulova Center and gathered some employees together. Spataro told the employees he wanted to know the result of their phone calls to Capital. Spataro said that if employees were offered a job, they should take it. Salley recalled that employees Moore, Magdalena Mercado, and Henry Ivy were present on this occasion and that other employees were there as well. Salley stated that at the meeting with Spataro, he told the employees he would try to provide them with transportation to the Capital office in Huntington Station, but there is no indication that Spataro ever did provide transportation nor that he ever made a specific offer to do so.

Ogden employee Ronald Moore testified that on May 1, 1992, he telephoned Capital Cleaning after he saw the Capital notice to Ogden employees. Moore stated that he spoke to a man; after Moore spoke to Dennis Kaplan while the Union was picketing the Bulova premises, he recognized Kaplan's voice as the voice of the man he had spoken to on the telephone when he called Capital. According to Moore, when he telephoned Capital on May 1, he asked about an application to work at the Bulova premises. Kaplan said the wages started at \$5 per hour with no benefits, and he asked whether Moore had any experience. Moore replied that he was currently working in the building. Then Kaplan said that he was not hiring union workers and that he was going to bring his own people in. When Moore said Bulova was a union building, Kaplan said it did not matter to him. Moore testified that he did not apply for a job with Capital because Kaplan told him he was not going to hire union workers. Moore testified that he did not tell his coworkers about this conversation. Moore's affidavit given to a Board agent states that the reason Moore did not apply for a job with Capital was that he heard that two people filled in applications and did not get called and that he had no way to travel all the way out to Huntington Station.

Ogden employee Oscar Gallardo testified that about 5 working days before he was laid off from the Bulova Center job he was given a telephone number to call in order to apply for a job at Capital Cleaning. Gallardo stated that Spataro gave him the number and that he did not obtain it from any document or flyer. Although Gallardo testified through an interpreter, he stated that he speaks some English. According to Gallardo, the man he spoke to at Capital identified himself as "Dennis." Gallardo gave the substance of his conversation in English at the instant hearing. Gallardo said he was looking for a job and Dennis asked where he worked at the present time. When Gallardo said he worked in the Bulova Center, Dennis said, "We don't need the people working from Bulova Building." Then Dennis asked if Gallardo had a union, and after Gallardo said that he did, Dennis said, "We don't need the people working in the Union." Gallardo testified that he told some of his coworkers about his conversation with Dennis: these included Socrates, Krystyna, Florencio, and Marta. Gallardo testified that after he made this telephone call, he received the notice from Capital; he did not telephone the Company again because he

had called them some days before and because he felt that the offer of \$5 was not fair.

Ogden employee Socrates Diaz-Miranda testified that Spataro gave him a photocopy of a newspaper ad with a telephone number on it and told him to call Capital Cleaning. Diaz-Miranda called Capital on April 15, 1992, and, speaking in English, gave his name, stated that he was calling from Bulova, and asked to speak to Dennis Kaplan.⁴ He then asked Kaplan for an application. Kaplan said the pay was \$5 per hour. When Diaz-Miranda said that the Bulova Center was a union building, Kaplan said that did not matter and that, "anyway, we have our own personnel." Diaz-Miranda said goodbye and did not call Capital again. Although Diaz-Miranda testified that he wished to continue earning his rate of pay with Ogden, he did not testify that this desire kept him from filing an application with Capital.

Ogden employee Magdalena Mercado testified that in April 1992, the employees met with Spataro and asked what would become of them because they had heard from the night supervisor that Ogden might lose the contract to clean the Bulova Center. Spataro told the employees not to worry: the incoming company would hire all of them, pay them the same salary, and they would have the same union. During the last week of April 1992, Spataro gave the employees the telephone number of Capital Cleaning. Mercado testified that she called the number and, testifying in English, she gave the substance of the conversation. When Mercado called Capital, she asked to speak to Dennis. Mercado gave her name, stated that she worked at Bulova, and asked whether the person would bring an application to the jobsite or whether it was necessary for her to go to the office. Dennis said that he did not need union people, that he paid only \$5 per hour with no benefits, and that he was bringing his own people. Mercado said that she needed a job. Dennis repeated that he was bringing his own people. Mercado told her coworker Florencio about this conversation. Mercado testified that she did not fill out an application with Capital because she believed that the company did not want union people. When Spataro asked the employees whether they had called Capital to apply for a job, Mercado told him what Dennis had said when she telephoned the company. Mercado acknowledged on cross-examination that she was not interested in a job at \$5 per hour with no benefits.

Ogden employee Rosa Porras testified that after she received the letter from Capital, she telephoned the company pursuant to the instructions in the letter. Porras stated that she understands a little English and that she spoke in English and Spanish when she called Capital. The man she spoke to asked where she had been working. When Porras replied that she was from Bulova, the man said there was no job for her. Porras did not file an application because the man said they had no job for her. Porras testified that she called Capital when she found that she was about to be left without a job. She also testified that she was told there was no job for her the week after she lost her job. From my reading of the record and after considering the difficulties inherent in translated testimony, I find that Porras called Capital right after she received the certified mail notice sent to her by Respondent.

⁴ Diaz-Miranda was able to testify in English when recounting the conversation with Kaplan.

Ogden employee Susana Olivera testified that she called Capital in response to the company's letter. Olivera understands a little English. She spoke to a man when she telephoned Capital but he did not identify himself. Olivera testified that she gave her name and said she was on the Bulova team; she asked if they had work. The man said that they did not have a job for Olivera.

Krystyna Mazurek testified that she received a letter from Capital on April 28, 1992, and that on the same day she telephoned the Company. Mazurek stated that she asked to speak to Dennis Kaplan and that she gave Kaplan her name. She told him that she wanted to work. Kaplan replied that he knew the Bulova Building but that he was coming to that building with his people. Mazurek did not apply for work because Kaplan told her that he was coming with his people. Mazurek recounted this conversation to her friends at work, Socrates, Ronnie, and Oscar. They told her that Kaplan said the same things to everybody.

Ogden employee Florencio Reinoso testified that he took no action after receiving the letter from Capital; he and his coworkers realized that Capital was no good because of the low salary and the lack of benefits. Reinoso stated that this was the only reason he did not apply for a job with Capital. Although Reinoso testified that all of his fellow employees said they could not support a family on \$5 per hour, he did not testify that they told him that was the reason they were not applying for a job with Capital.

Ogden employee Carlos Rojas testified that he called Capital and spoke to Dennis Kaplan in response to the company's letter. Rojas told Kaplan he was calling to find out about the job. Kaplan said he should make an appointment to fill out an application, that the job paid \$5 per hour, and that they had their own personnel to work with. Rojas did not go to Huntington Station for the application because Kaplan told him he would have no benefits. According to Rojas, he told no one else about his conversation with Kaplan at the time.

Dennis Kaplan testified that two or three people called him and said they were working at Bulova. These employees asked how to make application for a job with Capital at the Bulova Center. Kaplan told them to come to the office in Huntington Station and fill out an application. Although a few people said they would come out to Huntington Station, they never did. Kaplan could not recall the names of any of the employees with whom he spoke on the telephone. Dennis Kaplan denied that he asked any of the callers if they were members of the Union and he asserted that he said nothing to them about hiring union members.

B. Discussion and Conclusions

In order to find the violations alleged in the instant case, I must find that Capital did not wish to hire the employees of Ogden due to union animus, that Capital avoided hiring these employees, that Capital would have hired the employees but for their membership in the Union, and that Capital is thus a successor to Ogden. From these findings, a failure to negotiate with the Union would be unlawful.

There is ample evidence from which I can conclude that Capital displayed union animus and that Capital did not wish to hire the Ogden employees because they were represented by the Union. Although Dennis Kaplan testified that he wished to hire all the Ogden employees because they would

have ensured a smooth transition in the Bulova Center and because he doubted that KCR could find sufficient employees to do the job, he also testified that the Union's request that he hire the Ogden employees "seemed a little rough to us" because he was used to staffing the jobs with his own people. These statements on the core issue herein are inconsistent and self-contradictory. Kaplan's statement that he was used to staffing the jobs with his own people and his further testimony that he wanted to interview the people who came to apply also conflict with his testimony that almost all of Capital's work is subcontracted, and is inconsistent with Al Kaplan's testimony that Capital has no procedure for receiving applications from cleaning personnel because they are almost always hired by the subcontractors. These problems with Respondent's position and with the testimony of its president and vice president are crucial because so much of the instant case rests on credibility determinations. Thus, I find that Dennis Kaplan is not a credible witness and I shall not rely on his testimony where it is contradicted by more credible evidence.⁵ As a consequence, I do not credit him that Capital was willing to hire the union members who worked for Ogden, and I do not credit his explanations for the material events herein.

Further, I credit the testimony of employees who testified as to antiunion and other statements made by people at Capital's Huntington Station office. Although there are problems concerning dates and times testified to by the Ogden employees, I attribute these inconsistencies and failures of memory to the passage of time and to the fact that the witnesses were not sophisticated, highly educated people used to dealing exactly with dates and times. Ronald Moore, a witness with a demeanor which impressed me as truthful and reliable, testified that Dennis Kaplan told him that Capital was not hiring union workers and was bringing its own people to the job at the Bulova Center. Although Moore's affidavit did not mention this incident, I shall credit Moore's testimony because I find that he is a truthful witness. Moore stated that he did not tell his coworkers about this conversation. Patricia Salley, a witness with a particularly impressive demeanor who listened carefully to the questions posed to her and answered exactly, testified that she heard from Moore that Capital was not hiring union members. I shall credit Salley's testimony. Moore was only asked whether he told his coworkers about his conversation with Kaplan; he was not asked whether he discussed generally with his coworkers Capital's attitude toward union members. Oscar Gallardo testified that Dennis Kaplan told him that Capital did not need the people working at the Bulova Building and did not need people in the Union. Socrates Diaz-Miranda testified that Dennis Kaplan told him that Capital had its own personnel to staff the job. Magdalena Mercado testified that when she spoke to Dennis Kaplan, he told her that he did not need union people and that he was bringing his own people. Rosa Porras testified that the man at Capital told her there was no job for her. Susanna Olivera testified that the man at Capital told her that they did not have a job for her. Krystyna Mazurek testi-

⁵ Furthermore, during the hearing I observed Dennis Kaplan signaling an answer to Al Kaplan while the latter was testifying under oath. This grave act leads me to conclude that Dennis Kaplan did not have the proper respect for the requirement that witnesses give answers based on their recollections at the time of the hearing.

fied that Dennis Kaplan told her he was coming to the Bulova Center with his own people.

Respondent's contention that the notice brought by Dennis Kaplan to the Bulova Center and then mailed to employees' homes in the last week of April "effectively cured any unlawful statements allegedly made by Dennis Kaplan" under the standards of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), is without merit. Some of the employees spoke to Kaplan after they had received the notices and some employees never saw the notices at all. At any event, the notice can not be construed as unambiguous and specific repudiation of the statements made by Dennis Kaplan to the employees that he was not hiring union employees for the Bulova Center cleaning job.

Moreover, the actions taken by Capital show a desire to avoid hiring the Ogden employees. First, although the Union advised the Company on April 15 that the employees desired to apply for jobs, Capital made no attempt to arrange for an application process through the Union despite Spataro's repeated followup telephone calls. About April 20, Dennis Kaplan brought the notices to the Bulova Center and he and his supervisor were on the premises regularly thereafter; yet Kaplan made no attempt to organize any application process that would enable the employees to fill out applications and be interviewed on the premises. Kaplan did not even bring blank application forms to the employees, although he brought numerous copies of the notice. Kaplan wished the employees to undertake an onerous trip to Huntington Station, when Capital rented space in nearby Rego Park at a location that he himself used from time to time. The time set for the interviews was during the working hours of many of the unit employees. Further, Capital did not mail the notices directly to the employees until days before it was to begin performing the cleaning at the Bulova Center. Several witnesses herein testified that they received the notices a day or two before they lost their jobs and at least one witness called too late: she was told Capital did not need any employees. Finally, this procedure was in marked contrast to several prior occasions when executives of Capital carried applications and conducted interviews of cleaning personnel at the job premises.

Thus, in addition to telling some unit employees that Capital did not wish to hire union employees and that Capital was bringing its own employees to the job, Respondent showed its antiunion animus by making it very difficult for the employees to apply for jobs with Capital.⁶

There is no dispute herein that if Capital had actually hired a majority of Ogden's unit employees it would have been a successor to Ogden and would have been required to bargain with the Union under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Of course, Capital was not obligated to hire all or any of the Ogden employees; however, Capital could not refuse to hire the employees because they were members of the Union and to avoid having to recognize the Union.⁷ I have found above that Capital had an union animus and that it informed employees that it was not hiring Ogden employees, that it was not hiring union employees and that it was bringing its own people to the job. The testimony establishes that Ogden employees were informed of these com-

ments during meetings with their coworkers. Further, I have found that Capital designed an application process that was designed to frustrate the attempts of Ogden employees to apply for work and that this process was different from the one used on prior occasions when Capital hired cleaning employees. I find that Respondent Capital engaged in all of these actions because the Ogden employees were represented by the Union and to avoid having to bargain with the Union. As in *U.S. Marine Corp.*, supra, I find "substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine."

The General Counsel having proved that Capital avoided hiring the employees because of their union membership, the burden shifts to Respondent to show that it would not have hired the employees even if they had not been union members. *NLRB v. Transportation Management Co.*, 462 U.S. 393 (1983). Respondent has tried to meet this burden. First, Capital provided some vague testimony that the Bulova Center management was dissatisfied with the cleaning provided by Ogden. From this testimony, Capital asks that I infer that the employees were necessarily to blame and that not all the employees would have been hired by Capital even if they had all filed employment applications. As I have noted above, Bulova may have been dissatisfied with Ogden management, or some of the Ogden employees may have been to blame. In any case, Capital has not proved that any specific Ogden employee was unsatisfactory and that Bulova management would have blocked the hiring of any specific Ogden employee by Capital. Respondent Capital also points to the fact that no Ogden employees filled out applications for employment. However, the Union's letter making unconditional application for employment on behalf of unit members was sufficient to put Capital on notice that the employees wished to apply for employment.⁸ Further, I have found above that Capital's own efforts precluded the Ogden employees from making application and that Capital's antiunion statements conveyed to the employees that applying for work with Respondent would have been futile. While it is true that some Ogden employees testified that their only reason for failing to apply for employment with Capital was the very low wages and lack of benefits offered by Capital, this number consisted of Florencio Reinoso and Carlos Rojas. Testimony that other employees were dissatisfied with the terms offered by Capital does not prove that those other employees, when faced with the loss of their jobs and income, would not have gone to work for Respondent. If Capital had not announced that it was not hiring union members, the employees might have accepted jobs with Capital hoping that their Union might be able to secure better conditions for them. As the record stands, Capital has shown that two out of a total of 19 employees would not have applied and would not have been hired. The record is un rebutted, therefore, that if Capital had not discriminated it would have hired 17 of

⁶ *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 80 (1979).

⁷ *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989).

⁸ *Harvard Industries*, 294 NLRB 1102, 1110 fn. 18 (1989); *Weco Cleaning Specialists*, 308 NLRB 310, 318 fn. 15 (1992).

the 19 Ogden employees. Although Capital was not required to hire all the former Ogden employees, it was not entitled to discriminate against them because of their union membership. Because Capital engaged in such discrimination, "any ambiguity as to how many employees would have been hired, absent such discrimination, must be resolved against" Capital.⁹ I find that by discriminatorily refusing to hire the 17 employees because they were members of the Union, Capital violated Section 8(a)(3) and (1) of the Act.¹⁰

Respondent urges that employee Ronald Moore was a supervisor and not a member of the unit. Moore testified that he was hired as a porter on the day shift at Bulova and that he was promoted to lead porter for the day crew 1 year later. He earned \$9.50 per hour. Moore said he was "in charge." He explained that being "in charge" meant that he took orders directly from the Bulova Center manager, Dan Mishael. After Mishael told Moore what had to be done in the building, Moore told the employees. Moore did not evaluate the work of the other employees; that was done by the night supervisor, Eddie Andriades, when he came in each night. Employee Patricia Salley was hired while Moore was working on the day shift. She was interviewed by Ogden in the office. After she got to the workplace, Moore showed her what to do. If day-shift workers had to leave early, they told Moore and Moore would call District Manager Pat Gallagher. Gallagher would then tell Moore whether to let the employee go. As Moore put it, "I just informed him that the employee is sick and she needs to go home, and then he would tell me yes or no." Salley identified Moore as the lead man on the day shift, and she identified the supervisor as Pat Gallagher. Salley testified that when the uniform company delivered clean uniforms to the Bulova Center, either she or Moore signed for the delivery. If Salley needed time off, she would telephone Gallagher. On one occasion, Moore called Gallagher on her behalf and Gallagher agreed that she could have time off. Based on the testimony of Moore and Salley, I do not find that Moore was a supervisor under the Act. Although counsel for Respondent used leading questions to get Moore to agree that he directed the employees and assigned them work, and that Gallagher went along with what Moore said when he called to ask permission for an employee to leave work early, such generalized testimony was not supported by specific examples. During the hearing, I cautioned counsel that I would not be guided in my conclusions by the use of terms of art in leading questions but that I would base my findings on actual events that occurred and that witnesses were able to testify about. From the specific testimony given by Moore and Salley, it is clear that Moore did not evaluate the work of employees, that he did not discipline employees, that he did not make recommendations whether they should be granted time off, and that he did not hire and fire employees. Moore apparently acted as a conduit to the employees for instructions from the Bulova Center manager. There is no evidence that he exercised any independent judgment in relaying instructions about what specific tasks had to be accomplished every day. Moore was the classic leadman on the job, one who exercised routine authority in conveying the daily requirements imposed by Ogden and Bulova management. I note that the facts recited in Respondent's Brief con-

cerning Moore's duties and authority are not supported by the official transcript of the instant hearing.

I have found that absent antiunion discrimination, Capital would have hired a majority of the unit employees who performed the cleaning services at the Bulova Building. It follows, and I find, that Capital was a *Burns* successor to Ogden Allied Services.¹¹ Therefore, Capital was required to negotiate with the Union. By failing to recognize and negotiate with the Union, Capital violated Section 8(a)(5) and (1) of the Act. Furthermore, Capital had a duty to bargain with the Union over any change in terms and conditions of employment, including such mandatory subjects of bargaining as wages, benefits, and the contracting out of unit work to KCR.¹² I find that by setting the initial terms of employment without bargaining with the Union, Respondent Capital violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. All service employees employed at the Bulova Corporate Center, located at 75-10 Astoria Boulevard, in the Borough of Queens, City and State of New York, excluding all guards and supervisors within the meaning of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
2. Local 32B-32J is the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. By refusing to hire employees formerly employed by its predecessor Ogden Allied Services, because the employees were represented by Local 32B-32J and in order to avoid recognizing and bargaining with Local 32B-32J, Respondent has violated Section 8(a)(3) and (1) of the Act.
4. By refusing to recognize and bargain with Local 32B-32J as the collective-bargaining representative of the employees employed in the above-described unit, Respondent has violated Section 8(a)(5) and (1) of the Act.
5. By departing from preexisting conditions of employment of the employees and by subcontracting the unit work without prior notification to and bargaining with Local 32B-32J, Respondent has violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

I shall recommend that Respondent offer to the unit employees formerly employed by Ogden Allied Services who would have been hired but for the illegal discrimination against them, including those listed below, immediate and full reinstatement, without prejudice to their seniority and

¹¹ *U.S. Marine Corp.*, supra.

¹² *U.S. Marine Corp.*, supra at 672; *Lemay Caring Center*, 280 NLRB 60, 72 (1986); *Love's Barbeque*, supra at 82; *Weco Cleaning Specialists*, supra at 320. The duty to bargain over subcontracting unit work is established by *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964).

⁹ *Weco Cleaning Specialists*, supra at 319.

¹⁰ *U.S. Marine Corp.*, supra; *Weco Cleaning Specialists*, supra.

other rights previously enjoyed, discharging if necessary any employees hired in their place.

Oscar Gallardo	Marta Roman
Donald O. Darko	Nicolco Arsov
Leonor Alvarez	Henry Ivy
Krystyna Mazurek	Socrates D. Miranda
Rosa Porras	Susanna Olivera
Yanira Serrano	Walter Garcia
Ron Moore	Patricia Salley
Magdalena Mercado	Claudia Alzale
Maria Rosario	

I shall also recommend that Respondent make whole the above-named employees for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful refusal to employ them. Backpay shall be computed as in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1983).

I shall also recommend that Respondent be ordered to recognize and on request bargain collectively with Local 32B-32J with respect to the employees in the appropriate unit and, if agreement is reached, to reduce the agreement to a written contract. Additionally, Respondent shall be ordered to rescind any departures from terms and conditions of employment that existed immediately before Respondent's takeover from Ogden Allied Services, and to restore retroactively pre-existing terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from May 2, 1992, until Respondent negotiates in good faith with Local 32B-32J or to impasse. The remission of wages shall be computed as in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra. Respondent shall also remit all payments it owes to the employee benefit funds and reimburse its employees for any expenses resulting from the failure to make these payments in the manner set forth in *Kraft Plumbing Co.*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Capital Cleaning Contractors, Inc., Huntington Station, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Local 32B-32J Service Employees International Union as the

exclusive collective-bargaining representative of its employees in the appropriate unit found above.

(b) Unilaterally changes terms and conditions of employment of the employees in the appropriate unit without notifying and bargaining with Local 32B-32J.

(c) Refusing to hire employees because of their membership in Local 32B-32J or to avoid recognizing and bargaining with Local 32B-32J.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in appropriate unit found above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Rescind any departures from terms and conditions of employment that existed immediately before its takeover from Ogden Allied Services and retroactively restore pre-existing terms and conditions of employment including wages rates and benefit plans, and make the employees whole in the manner set forth in the remedy section above.

(c) Offer to unit employees formerly employed by Ogden Allied Services, including those listed in the remedy section above, immediate and full employment without prejudice to their seniority and other rights, discharging if necessary any employees hired in their place.

(d) Make whole the above-named employees for any loss of earnings and benefits they may have suffered by reason of Respondent's discrimination against them as described in the remedy section above.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Huntington Station, New York, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."